

November 22, 2019

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW, Suite 400
Washington, DC 20210

RE: Comments on Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, 84 FR 56894 (October 23, 2019)
RIN 1210-AB90

Dear Assistant Secretary Rutledge:

The ERISA Industry Committee (ERIC) writes to support the proposed rule "Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA" (Proposed Rule) issued by the United States Department of Labor (Department) and published in the Federal Register on October 23, 2019.

ERIC welcomes the Proposed Rule as an important step towards expanding the use of electronic delivery for benefit plan disclosures and urges the Department to move forward with finalizing the proposal. ERIC strongly supports the core of the Proposed Rule, which is a website posting safe harbor (the Notice and Access Safe Harbor) that permits plan administrators to satisfy the requirement that disclosures under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), be provided by delivery methods "reasonably calculated to ensure actual receipt"¹ by participants² by posting the documents to a website and preserving the right of individuals who prefer paper disclosures to opt into paper delivery.

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. With member companies that are leaders in every sector of the economy, ERIC is the voice of large employer plan sponsors on public policies impacting their ability to sponsor benefit plans for active and retired workers, as well as families. ERIC supports the ability of its large employer member companies to tailor retirement, health, and compensation benefits to meet the unique needs of their workforces and has a strong interest in policies that impact the ability of employers to provide effective and cost-efficient retirement and health care programs to

¹ 29 C.F.R. § 2520.104b-1(b)(1).

² In this letter, unless specifically noted, "participants" refers broadly to participants, beneficiaries and all other individuals with a right to receive disclosure documents under Title I of ERISA.

millions of workers, retirees, and their families. As such, ERIC has a vested interest in the Proposed Rule and its ability to increase efficiency and accuracy in the distribution of plan notices.

ERIC supports this Notice and Access Safe Harbor for many reasons and primarily because it will make it easier for participants to receive and access information about their employee benefits. ERIC is confident that by making these disclosures more accessible—and available at all times on a website—the Notice and Access Safe Harbor will help participants better understand their benefits and become more engaged in maximizing the value of their hard-earned employee benefits. ERIC also strongly supports the Department’s approach of broadly defining “covered individuals” as including both persons who provide an “e-mail or internet-connected mobile-computing device (e.g., smartphone) number” and those given an electronic address by their employers. This broader approach appropriately expands the class of persons who can receive electronic communications (without affirmative consent) beyond the “wired at work” approach used in the 2002 safe harbor (29 C.F.R. § 2520.104b-1(c), herein 2002 Safe Harbor). ERIC also agrees with the Proposed Rule’s expansion of the definition of electronic communications to include not only e-mail addresses but also phone numbers connected to smartphones and other mobile-computing devices. With these changes, the Notice and Access Safe Harbor can provide even more participants with easier access to important information about their employee benefits.

ERIC agrees with the Department that the Notice and Access Safe Harbor should be implemented as an important tool that will “create significant efficiencies in disclosing information by affording participants and beneficiaries the convenience of continuous access to their ERISA disclosures using an internet connected device.”³ ERIC also agrees with the Department that the Notice and Access Safe Harbor allows plan administrators to help participants by taking “advantage of existing and developing technology” and “creat[ing] internet-based experiences that result in a better understanding of the disclosed information.”⁴ Moreover, ERIC agrees with the Department that the Notice and Access Safe Harbor will “make retirement plan disclosures required under ERISA . . . more understandable and useful for participants and beneficiaries, while also reducing the costs and burdens they impose on employers and other plan fiduciaries[.]”⁵

For all of these reasons, ERIC strongly supports the Notice and Access Safe Harbor and the core elements of the Proposed Rule and urges the Department to move forward as soon as possible to finalize the Proposed Rule.

Nonetheless, as the Department formulates the final version of the rule (Final Rule), ERIC believes that the Department should go further in supporting electronic delivery by

³ 84 FR 56894, 56900.

⁴ 84 FR 56894, 56900.

⁵ 84 FR 56894, 56901.

modifying certain aspects of the Proposed Rule. In particular, ERIC believes the Final Rule should:

- be extended to welfare plans;
- allow the Notice and Access Safe Harbor to be the default method of communication for plan disclosures, unless a participant affirmatively opts into paper copies;
- not disrupt existing disclosure practices that plans rely upon to serve the best interests of participants;
- allow for technological evolution;
- modify specific aspects of the Proposed Rule, namely elements of the Notice of Internet Availability, the standards for internet websites, and the standards for monitoring of invalid electronic addresses; and
- clarify the implementation date of the Final Rule.

I. ERIC's Interest in the Ability of Participants to Receive Electronic Disclosures.

ERIC and its member companies appreciate the opportunity to provide these comments to the Department and to help improve the Notice and Access Safe Harbor so that participants can have greater access to and interaction with information about their benefits.

As a group, the ERIC member companies are uniquely positioned to provide valuable insight on disclosure practices, particularly the practices of large plans. As noted above, ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC's members are leaders in every industry sector and provide comprehensive retirement benefits to tens of millions of active and retired workers and their families across the country. ERIC has a strong interest in policies that facilitate the ability of employers to communicate with participants and that help ensure participants have easy access to information about their benefits.

II. Plan Participants Benefit from Electronic Communications.

ERIC's member companies invest considerable time into providing useful communications to participants and to improving those communications. In providing such communications, ERIC's member companies have found that electronic communications offer significant advantages for participants, as well as for plan sponsors and administrators. It is because of these advantages that ERIC strongly supports the Notice and Access Safe Harbor and the core elements of the Proposed Rule.

These advantages include:

- **Participant Access.** Most importantly, electronic delivery provides participants with constant and real-time access to information about their benefits. Paper communications can easily be lost, misplaced or overlooked in the blizzard of “junk mail” that most households receive daily. Using electronic communications, and especially website posting, makes it easier for participants to access and track communications. For example, once a participant throws away or loses a paper communication, it is lost forever (unless the participant goes through the difficult task of asking for a replacement copy, which may not be available). In contrast, documents posted to a website are preserved and are always accessible, twenty-four hours a day.

Website access also helps participants by creating a single repository for current plan information and disclosures that is up to date which is superior to determining which personal paper copy is the most recent communication. Another advantage is that when participants are directed to a webpage, they can often access other benefits-related documents and resources that are available to help them learn about, engage in and manage their benefits.

This more comprehensive access can be empowering for participants and help engage them in maximizing the value of their hard-earned benefits.

ERIC’s member companies regularly cite these access advantages for participants as a reason for favoring electronic communications. For example, in response to the Proposed Rule, one member company cited many of the above access factors (in support of the proposal) and also reported that because “many of our employees are very mobile and don’t have at-work spaces,” website posting will be very helpful by permitting those mobile employees to receive plan communications on their electronic devices.

- **Time Efficiency and Ensuring Current Information.** Electronic communications get to recipients faster than paper communications. This time savings can range from a few days to more than two weeks (for larger mailings). The time savings can be even greater for people who do not collect their mail frequently, either by choice or due to having a post office box. This time savings can be particularly helpful when a plan needs to alert a participant to a change; the change notice can be delivered to the participant immediately whereas a formal mailing can require significant time.

Another reason electronic communication is better for participants is that it helps ensure participants are reviewing the most current information. For example, one ERIC member company reports that it has had problems with participants retaining and referring to Summary Plan Descriptions (SPDs) that are out of date (because

the participant did not retain any Summary of Material Modifications or updated SPDs). With website posting, the participant will have immediate access to the current document and so will be more likely to review the most current information (such as the most current SPD).

- **Privacy.** Secure electronic communication offers more privacy protection than paper communications. For example, when a document is delivered by mail, there is no way to control who reads it, whereas electronic communications can be protected by usernames and passwords that protect against unauthorized access. Furthermore, paper copies must be shredded or otherwise disposed of to ensure privacy, which creates an additional burden for participants. This factor is increasingly important as benefits-related identity theft and scams appear to be increasing. This factor is also important to address privacy concerns around health information.⁶
- **Interactive Capability.** Interactive features make many electronic communications more user-friendly than paper communications. For example, most electronic documents have search features and can include hyperlinks to relevant background information.
- **Administration and Cost-Efficiency.** Providing communications electronically makes plan administration easier. This can have two positive impacts on the participant: first, it can free the plan administrator (or benefits staff) for other tasks that can benefit participants, and second, it can reduce the cost of plan administration, and those cost savings can be passed on to the participant.
- **Tracking Abilities.** A well-managed electronic communication system can help assist participants and plan administrators in keeping track of each other. As the Department is aware, there is increasing concern with ensuring that participants do not go “missing” (and conversely that participants be able to locate their past plans). Electronic communication helps address that problem, as it gives the plan an additional means besides a physical address for keeping track of a participant. It also allows the participant a digital point of contact for reaching the plan. This electronic connectivity can be an important tool to help ensure that the plan does not “lose” the participant (and vice versa), particularly as the world becomes more reliant on electronic communications for connectivity.
- **Environment.** Electronic media has the additional advantage of reducing the use of paper and of postal delivery, potentially minimizing harm to the environment.

⁶ As discussed below, ERIC recommends extending the Final Rule to welfare plans.

In addition to having significant advantages, electronic communication is increasingly (if not already) the normal form of communication. In less than ten years, the rate of smartphone ownership has more than doubled in American households; in 2019, 81% of Americans owned smartphones, up from 35% in 2011.⁷ More than half of U.S. adults also access the internet on more than one device, with tablets and e-reader devices widely adopted among the U.S. population (in addition to laptop computers and cell phones).⁸ Importantly, this access is increasing across all age groups and demographics. For example, there is evidence that disparities in access to the internet at home have become significantly less pronounced in recent years and have entirely disappeared when other demographic factors, such as language proficiency, are controlled for.⁹ More adults who had lacked access to the internet are now adopting internet usage, as illustrated by the increasing number of adults age 65 and older using the internet.¹⁰

In addition to being preferred, there is documented support for the proposition that electronic communications in the workplace are more efficient than paper. For example, one paper reported that 46% of employers reported the removal of paper communications to be the biggest single productivity improvement for their organizations;¹¹ and that when organizations become paper-free, 77% achieved improved results in 18 months or less, with 60% of the businesses seeing the same impact in 12 months.¹² Further, the paperless process has been found to provide faster responses and higher productivity.¹³

There is also substantial evidence that electronic communication is increasingly the preferred form of workplace communications, including benefit plan communications. As of 2011, 62% of U.S. workers used an online benefits system, compared to only 29% in 2005.¹⁴ That number is certainly higher today. A survey by Guardian Life Insurance Company of

⁷ The Pew Research Center, *Mobile Fact Sheet*, <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

⁸ The Pew Research Center found that nearly 75% of U.S. adults now own desktop or laptop computers and about 50% own tablet computers as of 2019. *Id.*

⁹ The Pew Research Center, *Digital Differences*, at 6 (2012), https://www.pewinternet.org/wp-content/uploads/sites/9/media/Files/Reports/2012/PIP_Digital_differences_041312.pdf

¹⁰ According to the Pew Research Center, 41% of adults age 65 and older use the internet as of 2012. *Id.*

¹¹ AIIM, *Paper Wars: an update from the battlefield* (infographic) (finding that 46% of the surveyed employers chose paper removal as the single biggest productivity-improvement factor), <https://info.aiim.org/winning-the-paper-wars>.

¹² AIIM, *Industry Watch: Paper Wars 2014 – an update from the battlefield*, at 22 (finding that 60% of paperless process users reported a payback period of 12 months or less, with 77% seeing a return after 18 months), <https://info.aiim.org/paper-wars>.

¹³ *Id.* at 20 (finding that more than half of the survey respondents experienced faster customer response from paper-free processes and more than 40% saw higher productivity by going paper-free).

¹⁴ Tara Cantore, *More Than Half of Workers Prefer to Enroll Online for Benefits*, at 1. <https://www.plansponsor.com/sponsors-enhancing-dc-plans-to-help-workers-save/>

America (Guardian Study) reported that about two-thirds of surveyed employers used a more digitized, electronic platform than a paper means of benefits administration.¹⁵

There is also significant evidence that benefit plan participants prefer electronic communications. One study reported 91% satisfaction with online enrollment (and a lower satisfaction with paper enrollment).¹⁶ The respondents who preferred online communications cited (as the reasons for their preference) convenience (89%), time savings (85%), and environmental protection (78%).¹⁷ This preference was reported across age spectrums. For example, a majority of both Millennial and Gen X respondents answered that a benefits web portal would help them better appreciate the value of their benefits.¹⁸

The efficiency benefits of electronic communication have been documented in the specific context of benefits administration. According to the Guardian Study, employers reported that electronic record-keeping (58%) and enrollment (57%) are “very efficient.”¹⁹ Highly digital-oriented employers consistently report higher efficiency gains and satisfaction with their benefits management, compared to employers relying on paper-based options.²⁰

Finally, it is also notable that employers report interest in guidance that supports increased electronic communications. According to one source, 36% of businesses reported that a mandate would likely trigger paper-free implementation, and 23% consider a compliance requirement as a vital support factor in going paper-free.²¹

These studies²² and discussions with ERIC member companies point to the significant advantages of electronic communications for participants and plans alike, and the increasing preference among participants for such electronic communications.

¹⁵ Guardian Workplace Benefits Study, 5th Annual (*Game-Changer: The Digitalization of Employee Benefits Delivery*, 2018), at 6, https://go.pardot.com/l/503851/2019-09-21/3tns48/503851/104371/2018_Guardian_WBS5_Digitalization_Employee_Benefits_Delivery.pdf

¹⁶ 91% of the survey respondents rated their online benefits enrollment as “very easy,” compared to 78% of those using paper. Tara Cantore, *More Than Half of Workers Prefer to Enroll Online for Benefits*, at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Guardian Workplace Benefits Study 5th Annual (*Game-Changer: The Digitalization of Employee Benefits Delivery*, 2018), at 6.

²⁰ According to the Guardian Study, at 8, “highly digital” employers rated the efficiency of their employee benefits functions at least 20% higher than paper-based employers: 67% of highly digital employers found enrolling employees to be very efficient, whereas only 44% of paper-based employers did; 68% of highly digital employers found record-keeping to be very efficient, whereas only 48% of paper-based employers did; and 53% of highly digital employers found eligibility processing to be very efficient, whereas only 33% of paper-based employers did.

²¹ AIIM, *Paper Wars: an update from the battlefield*.

²² These studies are in addition to the evidence, cited by the Department, of substantial access to and use of electronic media. 84 FR 56894, 56896.

There is also broad policy support for electronic communications. One example is the broad support in the United States House of Representatives and Senate (including the dozens of House and Senate cosponsors) for the Receiving Electronic Statements to Improve Retiree Earnings Act ("RETIRE Act"); a notable component of the RETIRE Act is its support for the electronic delivery of retirement plan communications (with a right to paper upon request).

For all of these reasons, ERIC strongly supports measures that facilitate electronic communications and welcomes the Notice and Access Safe Harbor as a critically important step toward supporting electronic delivery of benefit plan disclosures.

Of course, ERIC acknowledges that there is a population of participants (albeit increasingly shrinking) that does not have access to electronic communications, and that some participants prefer paper. ERIC wants to ensure that these individuals also have access to disclosure documents. However, ERIC believes that the Notice and Access Safe Harbor ensures that access by allowing those individuals to request in full, or on an individual document basis, paper documents.

III. ERIC Comments on the Proposed Rule

a. The Final Rule Should Also Cover Welfare Plans.

For all of these reasons, ERIC strongly supports the Notice and Access Safe Harbor and the core elements of the Proposed Rule.

But as the Department formulates the Final Rule, the Department should go further in supporting electronic delivery by modifying certain aspects of the Proposed Rule. Most importantly, in addition to covering retirement plan communications, the Final Rule should also apply to electronic communications (including by website posting) by welfare plans. There is no policy reason to withhold the clear benefits of communication by website posting from welfare plan participants. Website-posting communication provides significant advantages for participants, for all of the reasons outlined above. Those advantages apply equally to welfare plans and there is no policy reason (or at least, no policy reason that cannot be addressed) for denying the many benefits of electronic communications to welfare plan participants.

In fact, not including welfare plans in the Final Rule will create significant challenges for plan administrators. One complexity is that plan administrators will have to split certain communications into two different documents, one for retirement benefits and one for welfare benefits. Examples of this include SPDs. Plan administrators often combine SPDs into one book that covers retirement and welfare benefits. In the experience of ERIC's member companies, this combined document is helpful for participants, as it provides a single source of important plan information. It also helps ease plan administration, since there is only one book that needs to be maintained, updated and distributed. Another example is the Summary Annual Report (SAR), as plan administrators often combine retirement and welfare plan information into one notice. If the Final Rule is not extended to welfare plans, in order to use the Notice and Access Safe Harbor, plan administrators will have to split up their SPDs and SARs. Splitting these documents, or providing two copies, will be inefficient and possibly confusing to participants.

This point is illustrated by the following example: One ERIC member company reports that more than half of its benefits communications encompass both retirement benefits and welfare benefits. This is done because the company views the benefits received by participants holistically. In accordance with the holistic approach, the company coordinates retirement and welfare benefits; for example, retirees that elect an annuity from the pension plan can have their portion of the retiree medical cost deducted from their monthly annuity payout. For this member company, it will be very difficult to separate retirement communications from welfare communications, and that separation will undermine its holistic treatment of employee benefits.

A second challenge is that if the Final Rule is not extended to welfare plans, plan administrators that use the Notice and Access Safe Harbor will be forced to navigate two different disclosure regimes: one for welfare plans and one for retirement plans. This duality is not consistent with how ERISA has been historically interpreted by the Department. Since ERISA's enactment, there have been uniform rules governing the method of delivery of ERISA-required disclosures. It is important to note that the 2002 Safe Harbor did not divert from this uniform approach.

This two-track electronic disclosure regime will be difficult and confusing to administer. As ERIC understands the Proposed Rule, it essentially creates four classes of participants:

- Group 1: Participants who have either opted into electronic communication or are covered by the 2002 Safe Harbor because of an e-mail address regularly available at work. This group is covered by the 2002 Safe Harbor and the Notice and Access Safe Harbor.
- Group 2: Participants who are outside of Group 1, but are covered by the Notice and Access Safe Harbor because they have been provided an electronic address or have an electronic address known to the plan sponsor, even if they do not have regular access at work. This group is not covered by the 2002 Safe Harbor but is covered by the Notice and Access Safe Harbor.
- Group 3: Participants (expected to be mostly terminated participants) and beneficiaries who are not covered by either safe harbor because they have not established an electronic address with the plan administrator or no longer have a good electronic address (but have not opted out of electronic communications).
- Group 4: Participants who have opted out of electronic communications.

Having a different electronic disclosure regime for retirement and welfare plans will create substantial administrative challenges, particularly around Group 2. For that population, the plan administrator will be permitted to provide retirement plan communications through the website posting but not welfare plan communications. The administrator will have to keep track of two different communication methods, one for retirement benefits and one for welfare benefits. To use the examples of SPDs and SARs, the administrator will communicate those documents by website posting but will have to mail welfare SPDs and SARs. This will be extremely difficult to administer and track and may make the Notice and Access Safe Harbor unworkable.

This dual-communication regime will also be confusing for participants. For example, a participant could potentially receive two different SPDs, one for retirement benefits that is posted online and one for welfare benefits that is received by mail. This could be very confusing for the participant. A single SPD covering all benefits that is posted to the website will be easier for the participant to understand, access, and keep track of.

For these reasons, the Final Rule should also cover welfare plans. ERIC recognizes that there are additional factors to consider with respect to certain welfare plan communications, including the factors identified by the Department of security concerns and coordination with other agencies. But those factors should not be a wholesale obstacle to extending the clear benefits of the Notice and Access Safe Harbor to welfare plans. ERIC encourages the Department to affirmatively commit to including welfare plans in the Final Rule. At a minimum, the Department should extend the Notice and Access Safe Harbor to welfare plan documents that do not raise the complexity and coordination concerns noted by the Department, such as SPDs. The Department should also commit to engaging in a subsequent rule-making (for the reserved paragraph 29 C.F.R. § 2520.104b-31(c)(2)) within a reasonably brief period, to extend the Notice and Access Safe Harbor to all welfare plan documents.

b. The Final Rule Should Make the Notice and Access Safe Harbor the Default Method of Delivery.

Although ERIC welcomes the Notice and Access Safe Harbor as an important step toward expanding the use of electronic delivery, ERIC believes that the Final Rule does not go far enough in embracing electronic communication as the best approach for participants. Electronic communication provides significant advantages for participants, for all of the reasons outlined above. Based on these advantages, the safe harbor should go further in treating electronic communications as the default.

In particular, the Department should recognize the Notice and Access Safe Harbor as the default communication method, in the absence of an election by a participant to receive paper. As proposed, the safe harbor is still a paper-oriented approach. It treats paper as the default because the plan administrator cannot rely upon the website posting until it has established an electronic address for the participant. In an electronic orientation, the website posting should be the default until the plan receives notification that the participant wants to opt into paper.

ERIC encourages the Department to more clearly move toward this type of electronic framework and, in particular, to include in the Final Rule the treatment of the Notice and Access Safe Harbor as the default until a participant elects otherwise. In making this change, the Final Rule should allow website postings for all participants until they affirmatively elect paper copies. This should be done by amending the definition of "covered individual" (under 29 C.F.R. § 2520.104b-31(b)) to cover all individuals unless they have affirmatively opted into paper communications.

This change will bring a significant population into the Notice and Access Safe Harbor, which is Group 3, described above. As noted above, Group 3 is made up of participants (expected to be mostly terminated participants) and beneficiaries who are not covered by either safe harbor because they have not established an electronic address with the plan administrator

or no longer have a valid electronic address but have not opted out of electronic communications. The change ERIC is proposing expands the Notice and Access Safe Harbor by including Group 3 members as covered individuals until they affirmatively elect to receive paper communications.

Without this change, the Final Rule will still require plan administrators to expend significant resources on printing and mailing documents. In some cases, these mailings can be very voluminous (and expensive), such as when a new SPD is issued. Under the Proposed Rule, the Notice and Access Safe Harbor does nothing to improve access to information for Group 3 participants. The plan administrator is still required to send mailings to these Group 3 individuals even though the plan has no indication that these individuals even want paper documents or will read them.

ERIC recognizes that it is important that all participants are aware of the electronic means of communications and of their right to request paper communications. To ensure both, ERIC does not object to the Final Rule continuing to require an "Initial notification of default electronic delivery and right to opt out" (as described under 29 C.F.R. § 2520.104b-31(g)) to ensure that participants are aware of their right to receive documents in paper format. The rule could also continue to require the "Notice of Internet Availability" (as described under 29 C.F.R. § 2520.104b-31(d)) to ensure that plan participants are made aware when documents are posted online and to provide a method for alert when an electronic address is no longer valid. However, the provision should be amended to permit the plan administrator to mail that Notice of Internet Availability one time per year, and to require sending the Notice of Internet Availability by mail (one time per year) for those participants who have not yet provided an electronic address or received one through their employers.

In addition, ERIC recommends that the Department consider other changes to the Proposed Rule to more fully embrace electronic disclosure. First, the Final Rule should cover all ERISA-required disclosures and derivative required disclosures, like fund prospectuses. If electronic communication is more favorable for participants, and website posting the best option for such communications, the Notice and Access Safe Harbor should not be limited to particular disclosures. In this regard, and in response to the Department's question on this point, ERIC believes that the scope of covered documents in the Proposed Rule is too narrow and ERIC cannot identify a reason why "certain employee pension benefit plan disclosures are better suited for such electronic disclosure." 84 FR 56894, 56902. Once electronic disclosure is recognized as the preferred form of communication with participants, it follows that participants will benefit from including all disclosures in the Notice and Access Safe Harbor.

Second, and relatedly, the Notice and Access Safe Harbor should not exclude documents that have to be provided upon request. If a participant requests a document that is already posted to the webpage (in compliance with the Notice and Access Safe Harbor), there is no reason that the plan administrator should not be permitted to direct the participant to the webpage posting. Of course, if the participant has elected to receive documents by paper or specifically requests a paper copy, ERIC agrees that those participants should have the right to receive the requested items in paper format.

Third, while ERIC agrees that participants should be permitted to opt into electronic disclosure in full, and is generally amenable to allowing participants to request individual paper documents, it is concerned about the administrative difficulties of tracking those requests as required under the Proposed Rule. It is also concerned about potential for abuse, for example by a participant who does not opt out of electronic disclosures but then repeatedly asks for paper. ERIC asks the Department to consider appropriate limitations on the tracking obligation and on the right of participants to ask for individual paper documents, such as allowing for reasonable charges after a specified number of requests (per document or per year).

c. The Department Should Revise the Proposed Rule to Permit Existing Disclosure Practices that Serve Participants.

Although ERIC welcomes the Notice and Access Safe Harbor, it is concerned about individual elements of the Proposed Rule that might make current electronic practices unworkable. The Department should revise the Final Rule to ensure that it does not disrupt existing disclosure practices that serve the best interests of participants.

One example is the requirement under 29 C.F.R. § 2520.104b-1(d)(3)(iv), which states that a website address listed in the Notice of Internet Availability will be “sufficiently specific” if the address leads the covered individual directly to the document or to a login that leads the individual to the covered document. In the experience of ERIC member companies, many plan administrators utilize employee or plan portals that contain a collection and/or folder of plan disclosure documents. Under the Proposed Rule, a link to the portal (as opposed to a particular document in a portal) will not be covered by the Notice and Access Safe Harbor. The inability to direct participants to these types of portals undermines their use as a helpful resource for participants. The Final Rule should incorporate links to portals.

Moreover, the Proposed Rule does not permit attaching documents to the Notice of Internet Availability. Plan administrators often attach documents, such as SPDs, to electronic communications, and often find that participants appreciate that immediate access to the attachment. The Final Rule should permit the attaching of documents to the Notice of Internet Availability.

Another way the Department can make the Final Rule less disruptive to existing disclosure practices would be to make clear in the Final Rule that certain requirements will not be applied retroactively for documents that are already available on the website, such as the requirement that documents be text searchable. This will allow documents that are already posted to a plan’s website to be included in the Notice and Access Safe Harbor without reformatting.

For similar reasons, ERIC’s position is that the Department should not remove the 2002 Safe Harbor and the other existing electronic safe harbors (i.e., FAB 2006-03, FAB 2008-03 and TR 2011-03R), or at least should not remove them without engaging in substantial analysis to confirm that compliance with the Notice and Access Safe Harbor fully covers those safe harbors. Many plans designed administration around these safe harbors. In some cases, ERIC expects administrators will want to continue to utilize one of these safe harbors and engage in electronic communications without utilizing the Notice and Access Safe Harbor. The

Department should not disrupt the ability of plans to continue to do so. In particular, the Department should not remove the 2002 Safe Harbor and the other safe harbors unless, and until, it has fully confirmed that the Notice and Access Safe Harbor covers any existing administration designed to comply with those safe harbors. ERIC also recommends that the Department consider expanding the 2002 Safe Harbor to cover the Group 3 participants (as described above) covered by the Notice and Access Safe Harbor.

d. The Final Rule Should Allow for Technology Evolution.

Although ERIC welcomes the Proposed Rule, it is concerned about the Final Rule becoming out of date as technology evolves in rapid and unexpected ways. ERIC's membership found this to be a problem with the 2002 Safe Harbor. Between 2002 and 2019, electronic devices and capabilities evolved quickly, dramatically, and in some cases, in unexpected fashion. These changes made the 2002 Safe Harbor increasingly less useful. It is important that the Final Rule be more flexible and drafted to allow for evolving technology.

ERIC believes that the Department recognizes this concern and has sought to address these considerations in the Proposed Rule. ERIC notes with approval the Department's statements to that effect, such as the statement that: "[w]hen feasible and sufficiently protective of plan participants, the Department does not want to inhibit innovation in the delivery of required disclosures, especially as forms of internet-based communication continue to expand. In this sense, the Department wishes to explore whether the Proposed Rule would require revision to promote technical neutrality." 84 FR 56894, 56901.

In accordance with the Department's statements, ERIC has identified individual elements of the Proposed Rule that should allow for technological evolution. For example, ERIC agrees with the Department's approach toward defining an electronic address as including not just e-mails but also an "internet-connected mobile-computing device (e.g., smartphone) number," a company-issued mobile smartphone (with a data plan) and corresponding mobile phone number; or an internet-based mobile-computing device, such as a smartphone, tablet, or laptop computer. However, ERIC cautions the Department to not treat this as a definitive list of covered devices. While the devices in the Proposed Rule may be appropriate and exhaustive for today, it is not possible to predict how electronic communications will evolve and how participants will receive electronic communications in the future. For example, one regularly used electronic device not mentioned in the Proposed Rule (or the preamble) is smart watches. In ERIC's experience, many individuals already use smart watches as their regular, and preferred, method for receiving electronic notifications. Another example is "apps" (internet-based applications). Employers are increasingly using apps for communicating with employees. In the future, this may evolve to the point that employers are primarily communicating to employees through an app rather than over e-mail.

While ERIC supports the Department's statements that "the [P]roposal does not impose any specific requirements or limitations on the type of device that a person must have in order to be a covered individual under the safe harbor" (84 FR 56894, 56901), it is concerned that the Proposed Rule could be interpreted as providing a discrete list of the types of mobile-computing devices or technologies and that such a list could become quickly out of date. For that reason, ERIC would encourage the Department to adopt a Final Rule that does not limit the types of

internet-based devices that could constitute an electronic address, but instead defines “electronic address” more broadly to anticipate any device that allows electronic-based communication to a personalized electronic address or phone number.

The Department seems to recognize this concern, as the Proposed Rule preamble stated that:

The Department intends to avoid favoring any particular technology that is considered advanced today but could be outdated tomorrow. On prior rulemaking initiatives under ERISA, many commenters have cautioned the Department against inadvertently stifling innovation by sanctioning particular technologies considered state-of-the-art at the time, especially in matters of digital technology.

84 FR 56894, 56901.

ERIC agrees with the Department’s statement and recommends that the Final Rule achieve this goal by not limiting the definition of electronic addresses to enumerate forms of communication on specific devices.

For similar reasons, ERIC cautions the Department against imposing “different conditions” on different devices. Conditions that are specific to certain devices are likely to be out of sync as technology evolves in fast and unpredictable ways. ERIC therefore encourages the Department to make its device-related requirements generally applicable to all devices and capable of evolving as technology changes. The Department should also not adopt different rules for employer-provided electronic address versus personal electronic addresses, except to recognize that plan sponsors have more information regarding the continuing viability of an employer-provided e-mail.

ERIC also cautions the Department against imposing rules around security (of personal information and secure login procedures) that are too technologically specific, given that technology, and related security risks, is likely to evolve. While ERIC agrees that the security protections are important, ERIC favors a more flexible standard, such as a “reasonableness” security standard that is determined by current security standards.

e. ERIC Comments on Specific Elements of the Proposed Rule.

In addition to the general comments stated above, ERIC recommends that the Department modify specific aspects of the Proposed Rule, namely elements of the Notice of Internet Availability, the standards for internet websites, and the standards for monitoring of invalid electronic addresses.

i. Comments on the Notice of Internet Availability.

For the reasons stated above, in order to move away from a paper default approach, ERIC believes that the Notice of Internet Availability should be sent to all participants who have

not affirmatively opted into paper communications (with the notice being capable of being mailed for those participants for whom the plan does not have an electronic address).

In addition to that comment, ERIC has the following specific feedback on the Notice of Internet Availability.

First, ERIC strongly supports the allowance of a “combined” Notice of Internet Availability, as permitted under 29 C.F.R. § 2520.104b-31(i). Without this combined mailing, the Notice and Access Safe Harbor could become difficult to use, as it would require overly frequent Notices of Internet Availability. This could also lead to participant fatigue with participants ignoring the (too frequently received) notices.

But ERIC does not agree with—and does not see any reason for—limiting this combined Notice of Internet Availability to the seven disclosures listed in the Proposed Rule. There is no meaningful policy reason for limiting the combined disclosure to the seven enumerated documents. ERIC believes that the approach that makes more sense is to continue to require a Notice of Internet Availability in advance, but to allow plans to send combined mailings more than one time per year and allow the combined notice to cover all disclosures. This approach will be more manageable for administrators and less overwhelming for participants. For documents that are triggered by a specific event, such as a 404a-5 participant fee change notice, the underlying disclosure time rules, which will still apply, will ensure that the Notice of Internet Availability is timely.

Second, ERIC is concerned that the Proposed Rule sets content requirements for the Notice of Internet Availability that are overly restrictive and will not allow for technological evolution. ERIC agrees with the Department that the Notice of Internet Availability should be “written in a manner calculated to be understood by the average plan participant” (29 C.F.R. § 2520.104b-31(d)(iv)). However, some of the proposed requirements (under 29 C.F.R. § 2520.104b-31(d)(4)) are too restrictive. For example, the bar on “no double negatives” is very limiting. Other requirements are unclear and/or will be difficult to administer, such as the requirements of “everyday words” rather than “technical and legal terminology,” active voice, and “language that results in a Flesch Reading Ease test score of at least 60.” If these requirements remain in the Final Rule, it is going to complicate administration; every notice will have to be meticulously analyzed to remove passive voice and to achieve a Flesch Reading Ease test score (for example). ERIC recommends that the Department clarify that these examples are merely suggestions for satisfying a readability standard (and as such be moved to the preamble rather than the text of the Final Rule) rather than per se requirements. (The Department seems to appreciate this concern as it described the Notice of Internet Availability as designed to offer “a level of flexibility to administrators in how they draft the ‘brief description.’” 84 FR 56894, 56903.)

ERIC is also concerned that the restrictions on the Notice of Internet Availability content will not remain workable as technology evolves. As explained above, a key concern of ERIC is that the Final Rule remain helpful even as technology evolves. However, the Proposed Rule imposes restrictions on the content of the Notice of Internet Availability that may become problematic as technology changes. In particular, 29 C.F.R. § 2520.104b-31(d)(4)(ii) states that the notice can “contain only the content specified in paragraph (d)(3)” (plus pictures, logos

etc.) ERIC worries that this restriction on content will not allow for other text that may become appropriate, or even necessary, as technology evolves. A good example of this is that the strict limits to the Notice of Internet Availability preclude the use of hyperlinks and other embedded links, which can provide helpful reference information for participants and may evolve to become even more helpful as technology develops.²³ The Notice and Access Safe Harbor should encourage, not restrict, creative uses of technology to help participants. For that reason, ERIC recommends changing the form and manner requirements of the Notice of Internet Availability from a restrictive list to a flexible standard that allows for content changes as technology evolves. For example, under a flexible standard, the Notice of Internet Availability could be limited to the content specified in 29 C.F.R. § 2520.104b-31(d)(3) plus any information that is necessary and customary to alert a participant to the nature of the disclosure, to assist the participant with locating the disclosure online, and to provide material information about the participant's benefits.

For similar reasons, ERIC would caution the Department on adding even more restrictions to the Notice of Internet Availability in the Final Rule or adding more content requirements such as "a toll-free number" or the requirement that "specific website, login or password reset features . . . be described in the notice." These requirements are highly particular and could become out of date as the electronic-communications landscape evolves.

Similarly, while ERIC does not object to model notice language in the Final Rule (and has found that such models can help achieve compliance), any model should be flexible enough that it can evolve with technology.

ii. Comments on the Standards for Internet Websites.

ERIC agrees that any internet website used for the Notice and Access Safe Harbor should be generally available and allow participants access to covered documents (as set forth under 29 C.F.R. § 2520.104b-31(e)). However, it is important that this standard for internet availability recognize that a website can become unavailable through no fault of the plan. For that reason, ERIC agrees with the Department that the Notice and Access Safe Harbor should allow for (and does not remove safe harbor protection during) periods of temporary unavailability of electronic documents, so long as the administrator has reasonable procedures in place.

In addition, ERIC seeks clarification regarding the requirement that documents be posted until superseded (under 29 C.F.R. § 2520.104b-31(e)(2)(ii)). In particular, ERIC asks

²³ One ERIC member described how embedded links can be useful for providing relevant information without overwhelming the participant. "For example, if the notice is about contributing up to the IRS Limit, I could write 'The IRS has just released the [2020 contribution limits] and this means you can save more,' so that if someone wants to read more, they can, but we don't clog the communications with detail." The ERIC member identified other helpful uses of hyperlinks as including links to things like saving calculators, forecasting tools, links to definitions of key terms, etc.

that the Department clarify that unique documents (such as a blackout notice) that technically do not become superseded by reason of a subsequent version of the covered document, but cease to be relevant, can be removed after a limited period. ERIC suggests a three-year period because it aligns with ERISA's fiduciary-breach statute of limitations.

Finally, ERIC is concerned about any of the standards for internet websites that will not remain workable as technology evolves. In particular, while ERIC agrees that posted documents should be readable, capable of being printed and searchable, ERIC is concerned that application of this standard to all devices will become unworkable as new technologies emerge such as smartwatches and other small devices that present information in unique formats. Accordingly, ERIC recommends changing a number of the standards to require compliance only on a computer and other devices standardly used for that functionality (as opposed to all electronic devices). In particular, ERIC recommends changing:

- 29 C.F.R. § 2520.104b-31(e)(iv) to require that the covered document is presented on the website in a "widely-available format or formats that are suitable to be read or accessed online and printable clearly on paper *from a computer and all other devices that are standardly used for printing documents.*"
- 29 C.F.R. § 2520.104b-31(e)(v) to require that the "covered document can be searchable electronically by numbers, letters or words *from a computer and all other devices that are standardly used for performing such searches on a document.*"
- 29 C.F.R. § 2520.104b-31(e)(vi) to read that the "covered document is presented on a website in a widely-available format or formats that allow the covered document to be permanently retained in an electronic format *on a computer and all other devices that are standardly used for retaining documents.*"

These changes will ensure that documents are readable, capable of being printed and searchable on a computer and other devices that standardly have that functionality but will ensure the Notice and Access Safe Harbor remains workable even as participants begin using other devices that do not have these functionalities.

iii. Comments on Monitoring of Invalid or Inoperable Electronic Addresses.

ERIC agrees that a standard of "delivery methods reasonably calculated to ensure actual receipt of information" likely requires some reasonable actions once an electronic address is known to be invalid. For that reason, ERIC does not object to the requirement that the plan administrator take action upon knowledge of an invalid or inoperable electronic address. But ERIC is concerned about the requirement that the system "must be designed to alert the administrator of a covered individual's invalid or inoperable electronic address." 29 C.F.R. § 2520.104b-31(f)(4). ERIC is also concerned by the requirement in 29 C.F.R. § 2520.104b-

31(h) that after an employee severs employment, the “administrator must take reasonable measures reasonably calculated to ensure the continued accuracy of the electronic address.”

In particular, ERIC is concerned that these requirements could be read to require the plan administrator to proactively identify invalid or inoperable electronic addresses. The duty of the administrator should be limited first to what is reasonably available technologically, and second to acting *upon* the receipt of notice of an invalid or inoperable electronic address rather than having an affirmative duty to test the validity of electronic addresses when it may be unnecessary.

In the paper mail context, the plan administrator’s duty is primarily to search in response to an indication that an address is invalid, such as by returned mail. There is no affirmative duty to test the validity of the participant’s address (in the absence of an indication that the participant is missing). Electronic addresses should be subject to the same standard.

For these reasons, ERIC agrees with the Department’s statements (and strongly supports the Final Rule continuing to recognize) that “[s]o long as the plan administrator is not alerted to an invalid or inoperable address, and the other conditions of the proposed safe harbor are satisfied, the administrator is considered to have furnished the pension documents required under Title I of ERISA.” 84 FR 56894, 56905-56906. A different approach would unfairly shift the burden too far onto the plan administrator, particularly with respect to monitoring the electronic addresses of separated employees and participants who provide their own electronic (non-work) addresses.

In ERIC’s experience, plan sponsors do not (or do not uniformly) have access to technology to monitor the validity of an electronic address. As one ERIC member company summarized, the change to require proactive identification of invalid or inoperable electronic addresses:

will require technology changes by IT which can be costly, cumbersome and take a long time. Organizations that do not have this technology will have to implement processes such as requiring the employee to type the email address twice to verify that it matches. Then a validation email [will need to be] sent to the employee to verify the email address. We do not have that in place at [the company] at the moment.

That same company also described the challenges of making even “easy” corrections to electronic addresses:

We have come across email errors in the past where a change was logical; for example, instead of the email address ending in @aol.com the email said @aop.com or instead of @gmail.com it said @gmai.com or sometimes the “.” was missing for example @gmailcom. Though making these corrections may be logical, [it requires us] to make corrections based on assumption. If we send the information using the email address that we corrected, and it ends up being a wrong email address, we will have an appeal on our hands because that’s not what the employee shared with us. We do use a system that tells us if an email bounces, but it doesn’t give us a correct email in return.

In the experience of this member company, implementing a system to more proactively monitor incorrect electronic addresses will not be “a quick fix.” As this example illustrates, if the Final Rule were to require this type of affirmative monitoring, it will render the Notice and Access Safe Harbor unworkable and overly burdensome.

For similar reasons, ERIC also agrees that the Notice and Access Safe Harbor should not “address issues such as whether a covered individual read, understood, or had actual knowledge of the contents of the covered documents accessed” and should not “impose an affirmative obligation on the plan administrator to monitor whether covered individuals visit the specified website or login at the website.” 84 FR 56894, 56906. In the paper mail context, this requirement does not apply, and it should not apply in the electronic disclosure context either.

Finally, for these monitoring requirements, ERIC asks that the Department consider explicitly adopting a good-faith compliance standard, such as a standard that allows a plan administrator to continue to satisfy the Notice and Access Safe Harbor even when the plan administrator is unknowingly utilizing an invalid or inoperable electronic address (provided the administrator acted reasonably and did not ignore clear notice that the electronic address was incorrect).

f. The Final Rule Implementation Date Should Be Clarified.

ERIC recommends that the Department more clearly define the effective date of the Notice and Access Safe Harbor in the Final Rule. The Proposed Rule is confusing on this point because it references both an “effective date” (60 days from publication of the Final Rule) in 29 C.F.R. § 2520.104b-31(k)(1) and an “applicability date” (of the first day of the first calendar year following publication of the Final Rule) in 29 C.F.R. § 2520.104b-31(k)(2). With these two dates, it is unclear when plan administrators can rely on the Notice and Access Safe Harbor, and when related changes, such as the withdrawal of the other guidance, go into effect. The Department should clarify these dates in the Final Rule.

In addition, ERIC asks that if the effective date of the Notice and Access Safe Harbor is the longer date (the first day the of calendar year after adoption), the Department make clear that the safe harbor can be used immediately upon publication of the Final Rule to constitute compliance with the requirement that disclosures be “reasonably calculated to ensure actual receipt” by a participant.

IV. Response to Request for Information Will Take Additional Time But Should Not Delay Issuance of a Final Rule.

With the Proposed Rule, the Department also issued a Request for Information (RFI). The questions in the RFI are important and, because of their data-driven nature, ERIC needs more time to answer them fully. However, finalization of the Proposed Rule should not be slowed by waiting for responses to these questions. As a matter of fact, a number of these questions could be more accurately answered once there is a final rule allowing for electronic disclosure as the default option.

The questions in the RFI focus on a number of issues, including the effectiveness and efficiency of communications, the organization and simplification of notices, the design and impact of disclosures, the potential for expanding information through websites and apps, cost savings attributed to electronic disclosure, and the coordination of required notices under the Internal Revenue Code and ERISA.

In general, ERIC member companies believe that electronic communication will provide more efficient disclosures that will aid participants by providing a central repository for plan documents and by allowing participants to access documents when they need them. Also, electronic disclosure can allow plan sponsors to “layer” information in notices by using hyperlinks and embedded links. And while plan sponsors do expect for there to be cost savings, the true benefit is creating greater access to information for plan participants.

ERIC has long supported simplification of plan notices by eliminating unnecessary and redundant disclosures. Such simplification would be enhanced by coordination with the Treasury Department and the Internal Revenue Service. For that reason, ERIC strongly recommends that the Department consider coordination with these agencies as well as with the Pension Benefit Guaranty Corporation and other relevant agencies.

Again, we will provide additional and specific responses to these questions at a later date and again stress that finalizing the Proposed Rule should move forward and does not require waiting for responses to the RFI.

* * *

ERIC appreciates the opportunity to provide feedback at this time. If you have questions concerning our comments on the Proposed Rule, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,



Aliya Robinson

Senior Vice President, Retirement and Compensation Policy